



June 1, 2000

Ms. Elizabeth P. West
Personnel Attorney
General Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2000-2153

Dear Ms. West:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136401.

The Texas Natural Resources Conservation Commission ("TNRCC") received a request for information related to the employment and termination of the requestor, a former TNRCC employee. You claim that TNRCC has released some of the requested information, but that the remaining information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107 provides in relevant part that information is excepted from required public disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). Although the scope of section 552.107(1) would appear to be co-extensive with that of rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging "confidential information," this office has concluded that such an interpretation of rule 1.05 would be in potential conflict with the purposes of chapter 552 of the Government Code. *See* Open Records Decision No. 574 at 4-5 (1990) (construing predecessor statute). Accordingly, this office has determined that

section 552.107(1) protects only what rule 1.05 describes as “privileged” information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. “Unprivileged” information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8. Basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* You assert that some of the requested information contained in Exhibits A, B, and C is protected by section 552.107. Based on our review of these records, we conclude that some of the information contained in these documents is excepted from disclosure under section 552.107(1). We agree with your assertion, however, that some of the information contained in these exhibits is not responsive to the request. Specifically, you have provided entire reports which contain both responsive information, information relating to the requestor, and non-responsive information unrelated to the requestor. We have marked the information that TNRCC may withhold under section 552.107. The remaining information relating to the requestor must be released.

TNRCC has provided information identified as Exhibits E and F, the release of which you assert would endanger TNRCC employees. Government Code section 552.108 affords discretionary protection to the records held by a law enforcement agency or prosecutor. Section 552.108 also applies to the records of that portion of an agency whose primary function is to investigate crimes and enforce criminal laws. *See Open Records Decision Nos. 493 at 2 (1988), 287 at 2 (1981).* It generally does not apply to the records of regulatory agencies. *Open Records Decision No. 199 (1978).* In *Open Records Decision No. 493 (1988)* we concluded that, to the extent that a governmental body’s investigation revealed criminal conduct that the governmental body intended to report to appropriate law enforcement officials, section 552.108 would apply to the information if its release would unduly interfere with law enforcement efforts. *ORD No. 493 at 1.* You do not indicate that you have detected criminal activity or reported any to a law enforcement agency, therefore, no information may be withheld under section 552.108.

Section 552.101 protects information considered confidential under the common law right to privacy. Information is protected by the common law right to privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. of South Tex. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

We have held, under section 552.101 in conjunction with common law privacy, that information may be withheld from public disclosure in special circumstances. *See Open Records Decision No. 169 (1977).* An imminent threat of physical danger, as opposed to a generalized and speculative fear of harassment or retribution, is one such “special

circumstance.” *Id.* at 6. A determination of “special circumstances” can only be made on a case-by-case basis, with the initial determination made by the governing body. *Id.* at 7.

TNRCC has provided a copy of an email from the requestor to his deputy director in which he states “I have reached the absolute boundry [sic] of my tolerance with this situation” and “[p]lease see if anything can be done before I go completely ‘postal.’” Further, when confronted with a draft of his termination letter, he responded, “[t]his is the last nail in his coffin,” referring to his division director, and “[w]e’ll see who gets terminated.” You also indicate that the requestor has made repeated attempts to gain access to TNRCC computers, knowing he was no longer authorized to do so. We have reviewed the requested information and considered TNRCC’s stated concerns for the safety and well-being of its employees. Whether these statements were made in the heat of the moment, we nonetheless conclude that TNRCC’s concerns are justifiable and that there is an imminent threat of physical danger if some of the requested information is released. Accordingly, under section 552.101 in conjunction with common law privacy, TNRCC may withhold the information that we have marked in Exhibits E and F.

However, a governmental body may not withhold information about an individual solely on the grounds that the individual’s privacy interests are at stake. Gov’t Code § 552.023. You have provided statements made by the requestor at Exhibit D. TNRCC must release this information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/CHS/ljp

Ref: ID# 136401

Encl. Submitted documents

cc: Mr. Sean I. Wallace
12345 Lamplight Village Avenue, #412
Austin, Texas 78758
(w/o enclosures)